ROSITA BT. BAHAROM (AN INFANT SUING BY HER FATHER AND NEXT FRIEND BAHAROM BIN ISMAIL) & ANOR.

v.

SABEDIN BIN SALLEH

SUPREME COURT, KUALA LUMPUR
TAN SRI HARUN M. HASHIM SCJ,
DATUK WIRA L.C. VOHRAH J.,
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[CIVIL APPEAL NO. 02-504-91]
22 FEBRUARY 1993

TORT: Road accident - Court accepting defendant's version of how accident happened - Plaintiff amending pleadings after close of case but before submissions - Amendment to plead contributory negligence - No particulars given in pleadings - Whether amendment caused defendant to be taken by surprise and therefore be prejudiced - Trial Judge dismissing plaintiff's claim - Appeal against dismissal.

PRACTICE AND PROCEDURE: Cautionary reminder on the cavalier manner in which pleadings are being drawn up in negligence cases.

The plaintiff alleged that she had been struck from the rear by the defendant's scooter while walking along her side of the road. The defendant alleged that the plaintiff had, without warning, darted across the road from the right to the left, giving him no opportunity to avoid the collision.

The plaintiff amended her pleadings a number of times the last amendment being made after the conclusion of the hearing but before submissions which amendment for the first time alleged contributory negligence on the part of the defendant. The learned trial Judge accepted the defendant's version of the accident and dismissed the plaintiff's claim.

Held:

[1] The learned Judge was correct in his finding as a fact "that at the material time the plaintiff was crossing the road from the right to the left when she was knocked down by the defendant who was proceeding along his right of way" and that the plaintiff was actually to blame for the accident.

[2] In appropriate circumstances evidence given at a trial can overcome defects in the pleadings of the plaintiff as long as the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleadings.

[3] The learned Judge was correct in coming to the conclusion that the defendant had been taken by surprise and was therefore prejudiced by the latest amendment at such a late stage.

[*Appeal dismissed with costs*].

[**Bahasa Malaysia** Translation of Headnote]

TORT: Kemalangan jalanraya - Mahkamah menerima versi defendan yang mengatakan bagaimana kemalangan berlaku - Plaintif meminda pliding pada penghujung kes tetapi sebelum penghujahan - Pindaan untuk memasukkan kecuaian sertaan - Tiada butir-butir diberikan dalam pliding - Sama ada pindaan menyebabkan defendan dikejutkan dan memudaratkan defendan - Hakim bicara membatalkan tuntutan plaintif - Rayuan terhadap pembatalan.

AMALAN DAN PROSEDUR: Peringatan 'cautionary' mengenai sikap 'cavalier' dalam mana pliding dibuat berhubung kes kecuaian.

Plaintif telah menyatakan bahawa ia telah dilanggar dari belakang oleh sekuter defendan semasa berjalan ditepi jalanraya. Defendan telah mengatakan bahawa plaintif telah melintasi jalan tanpa amaran dari sebelah kanan ke kiri jalan tanpa memberi peluang untuk defendan mengelakkan kemalangan itu.

Plaintif telah meminda plidingnya beberapa kali dan pindaan terakhir telah dibuat pada penghujung perbicaraan tetapi sebelum penghujahan dimana buat pertama kali tuduhan kecuaian sertaan telah dihadapkan pada defendan. Hakim bicara yang arif telah menerima versi defendan dan membatalkan tuntutan.

Diputuskan:

[1] Hakim bicara yang arif telah membuat penemuan fakta yang betul iaitu "pada masa tersebut plaintif telah melintasi jalan dari sebelah kanan ke sebelah kiri jalan semasa ia dilanggar oleh defendan yang menaiki skuternya dengan hak lalu-lalangnya" dan plaintif haruslah dipersalahkan untuk kemalangan tersebut.

[2] Dalam keadaan tertentu keterangan yang diberikan semasa perbicaraan boleh mengatasi kecacatan (defects) dalam pliding plaintif asalkan defendan dari awalnya tidak diperdayakan, diprejudiskan, dimalukan atau dipengaruhi oleh pliding plaintif.

[3] Hakim bicara yang arif membuat kesimpulan yang betul bahawa defendan telah dikejutkan (taken by surprise) dan oleh itu telah dimudaratkan oleh pindaan pada peringkat akhir itu.

[Rayuan dibatalkan dengan kos].

[Ed. Note: The judgment of the High Court was reported in [1992] 1 CLJ 180]

Cases referred to:
Butterfield v. Forrester [1809] 11 East 60 ***(refd)***
Taylor v. Simon Carves Ltd. [1958] SLT (Ch. Ct) 23 ***(refd)***
Wong See Leng v. C. Saraswathy Amal [1954] MLJ 141 ***(refd)***
Tan Lian Chye v. Malayan Railway Administration [1967] 2 MLJ 276 ***(refd)***
Menah Binti Sulong v. Lim Soo & Anor. [1983] 1 CLJ 26 ***(refd)***
K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***
Siti Aisha binti Ibrahim v. Lim Soo & Anor. [1982] CLJ 544/[*1982] 2 MLJ 124* ***(refd)***
Ang Koon Kau v. Lau Piang Ngong [1985] 1 CLJ 31/[1984] 2 MLJ 277 ***(refd)***
Seng Chong Metal Works Ltd. v. Lew Fa [1966] 2 MLJ 63 ***(refd)***
Noor Azahar bin Habin v. Rajaswari a/p Sithampara Pillai & Anor. [1991] 1 CLJ 150 ***(refd)***
Farrel v. Secretary of State for Defence [*1980] 1 All ER 166* ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 12(1)
Civil Procedure Act 1833 (UK)
Law Reform (Contributory Negligence) Act 1945, s. 1(1) (UK)

For the appellant - Chen Kok Keong; M/s. Rhina Bhar & Associates
For the respondent - Bala Mahesan; M/s. Bala Mahesan

JUDGMENT

L.C. Vohrah J:
This is an appeal from the judgment of Edgar Joseph Jr. J. (as he then was) dismissing the claim of the plaintiff. The action is one of negligence and arose out of an accident along the Sungai Acheh/Tanjong Berembang road in Penang on 28 April 1977 in which the plaintiff, then aged 10 years, suffered rather severe injuries.

The case for the plaintiff was that as she was walking side by side with her sister (PW2), then apparently aged 6 years, close to her left edge of the road 16 feet wide in the direction of Tanjong Berembang with the intention of boarding a bus at a point on the other side of the road on their way to school, she was collided into from the rear by the defendant riding a Vespa motor scooter. The case for the defendant, on the other hand, was that he was proceeding along the road in a normal manner at a reasonable speed in the same direction when the plaintiff without any warning suddenly darted across the road from his right to his left leaving him no opportunity to avoid the collision.

The plaintiff herself did not testify at the trial and the evidence on her behalf as to how the accident occurred was furnished by a family friend (PW1) who happened to be at the scene at the time of the accident and by PW2.

PW1, who was a neighbour of the plaintiff and was aged 14 years at the time, testified that he witnessed the collision at about 7.15 a.m. when he was waiting for a bus on the left-hand side of the road as one faced Tanjong Berembang whilst the plaintiff was walking on the same side of the road in his direction on the metalled surface of the road about 3 feet from the edge of the road with PW2 walking abreast of her on her left along the side-table. He then saw a scooter coming from behind the plaintiff and colliding into her as a result of which she fell on to the ground and lost consciousness. PW2 also stated that she was walking abreast of the plaintiff who was then about 3 feet from the edge of the road when the scooter, which came from behind, knocked into the plaintiff.

The evidence for the defence was given by the defendant alone. He, on the other hand, testified that at the material time he was riding his scooter at about 30 k.p.h. about 3 to 4 feet from his left edge of the road on his way to work in the direction of Tanjong Berembang when he noticed 3 girls standing on the grass verge to his right about 4 electric poles away. When he had slowed down whilst approaching a bend and was about 6 feet from them one

of the girls dashed across the road into his path with her arms out-stretched and flapping in the air like the wings of a bird leaving him no opportunity of avoiding a collision as a result of which the plaintiff fell on her back with her head coming to rest near the central white line. He too fell and his scooter came to a rest on his right-hand side of the road. After carefully scrutinising the totality of the evidence oral and otherwise, and after keenly weighing the credibility of the witnesses, the learned Judge believed the defendant and found his version of the circumstances relating to the collision to be correct. We have reviewed the whole of the evidence and find ourselves in full agreement with the learned Judge's finding as a fact "that at the material time the plaintiff was crossing the road from the right to the left when she was knocked down by the defendant who was proceeding along his right of way" and that the plaintiff was actually to blame for the accident. That really should dispose of this appeal but learned counsel for the plaintiff in his arguments before us has invited us to reverse the finding of the learned Judge on the ground that he had failed to consider the question of contributory negligence on the part of the defendant. He argued that even if the version of the defence was believed wholly by the learned Judge the defendant should, on the basis of his own version, have been found to have been partly responsible for the accident. The point of his argument is that having regard to the speed at which the defendant was travelling and to the fact that the defendant had seen the girls some 198 feet (the distance agreed to by both Counsel as the distance between 4 electric posts) away the collision could have been avoided if he had kept a proper look-out. It is to be noted that this plea of contributory negligence has been set up not as a shield in a statement of defence but as part of the claim of the plaintiff. As is well-known, until comparatively recently at common law the plea of contributory negligence operated as an absolute defence to an action based on negligence (*vide Butterfield v. Forrester* [1809] 11 East 60) and the rigidity of that law was mitigated only with the passing of the English Law Reform (Contributory Negligence) Act 1945, s. 1(1) which provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

The provisions of s. 12(1) of our Civil Law Act 1956, are identical to the above provisions and the primary purpose of these provisions was to alter the law whereby a claim was defeated by contributory negligence, and to substitute, in such circumstances, an apportionment of liability (*vide Taylor v. Simon Carves Ltd.* [1958] SLT (Ch. Ct:) 23). Be that as it may, the plaintiff in this case filed her **original** statement of claim on 31 May 1979 alleging in paragraph 3 thereof that she "was standing along the **middle white line** of the road between Sungai Acheh and Tg. Berembang ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff." In her **amended** statement of claim filed on 4 February 1987 she alleged this time in paragraph 3 thereof that she "**was standing along the right edge** of the road between Sungai Acheh ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff." In her **re-amended** statement of claim filed on 16 February 1987 she alleged yet differently in paragraph 3 thereof that she "was **walking along the middle white line** right edge of the road between Sungai Acheh and Tj. Berembang as one faces Sungai Acheh ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff." In her **further re-amended** statement of claim filed on 5 February 1991, after, we note, the close of the case for the defence on 14 February 1990, she finally alleged in paragraph 3 thereof that she "**was standing along the right edge of the road** between Sungai Acheh and Tg. Berembang as one faces Sungai Acheh ... when the defendant drove his motor cycle from the direction of Sungai Acheh ... so negligently that he collided into the infant plaintiff" and added a new paragraph 3A alleging that "the said collision was caused solely and/or contributed to by the negligence of the defendant in the management and control of the said motor cycle No. PK 2533".

No particulars, of contributory negligence on the part of the defendant were ever given. The learned Judge then reviewed a series of authorities, namely *Wong See Leng v. C. Saraswathy Amal* [1954] MLJ 141, *Tan Lian Chye v. Malayan Railway Administration* [1967] 2 MLJ 276, *Menah Binti Sulong v. Lim Soo & Anor.* [1983] 1 CLJ 26, *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10, *Siti Aisha binti Ibrahim v. Lim Soo & Anor.* [1982] 2 MLJ 124, and *Ang Koon Kau v. Lau Piang Ngong* [1984] 2 MLJ 277, and came to the conclusion that there is "a consistent current of judicial opinion for the proposition that a plaintiff in a running down case can depart from his pleadings at the hearing provided the defendant is not taken by surprise." Having considered the relevant authorities ourselves we would agree that in appropriate circumstances evidence given at a trial can overcome defects in the pleadings of the plaintiff as long as the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleadings (*vide Siti Aishah's* case (*supra*), per Abdul Hamid FJ (as he then was) at p. 126). However, in the present case the learned Judge noted that in the further re-amended statement of claim the defendant had alleged that she was **standing** on the right edge of the road preparing to cross the road to catch a bus when she was knocked down by the defendant. He observed that at the hearing PW1 and PW2 whom she called to give evidence on her behalf had said that she was **walking** along the side of the road when she was knocked down by the defendant from the rear whilst the evidence of the defence was that she was crossing the road when the collision occurred. The learned Judge was thus faced with the task of having to decide whether learned Counsel for the plaintiff was at liberty during his final submission on 7 May 1991, to rely on the defendant's evidence in order to make out a case of contributory negligence on the part of the defendant especially when the earliest indication that such argument might be advanced was given, as the learned Judge stated, only on 6 February 1991, long after the parties had closed their respective cases at the hearing, when it became known that paragraph 3 of the original statement of claim was amended for the third time and the totally new paragraph 3A was added. Even then, as was stressed by the learned Judge, no particulars of the contributory negligence were given and although the learned Judge opined that the effect of this omission was "as good as not pleading the point at all" he nevertheless leaned in favour of the plaintiff and assumed that it had been pleaded without particularisation. It is clear from the judgment of the learned Judge that he was rightly concerned that the defendant should not be taken by surprise and thus be prejudiced by this late amendment long after the hearing of the evidence adduced by both parties had been concluded. After considering the prevailing authorities relating to the function of pleadings and the circumstances of this case, the learned Judge came to the conclusion that the defendant had been taken by surprise and was therefore prejudiced by the latest amendment at such a late stage. Two considerations affected his conclusion. The first was the statement of Murray-Aynsley CJ in *Wong See Leng's* case (*supra*) which impelled him to the view that as soon as the defence had been delivered the plaintiff should have promptly pleaded in the alternative to the effect that if negligence on the part of the plaintiff was shown the defendant was also negligent and but for that negligence the collision would not have occurred. The second was the statement of Thomson LP in *Seng Chong Metal Works Ltd. v. Lew Fa* [1966] 2 MLJ 63 which influenced him into taking the view that learned Counsel for the plaintiff should have put her case to the defendant in cross-examination that even on his own version he was guilty of contributory negligence. He explained that then the defendant would not have been taken by surprise and thus prejudiced because "then most probably the re-examination of the defendant and generally the case for the defendant would have been differently developed." We find ourselves in agreement with the conclusion reached by the learned Judge in the circumstances of this case and in the light of the prevailing authorities he referred to. We do not think, as was suggested by learned Counsel for the plaintiff, that the learned Judge was delving into the realm of mere technicality when he reached the conclusion that he did. The system of pleadings has not been designed to be weighted in favour of the plaintiff but to ensure, as has been said time and again, that there is fair play between the parties and that each party

knows what issues he has to meet on the pleadings in advance. In the course of this appeal we have been alerted to the cavalier manner in which pleadings are being drawn up in negligence cases at the present time (*vide Noor* Azahar bin *Habin v. Rajaswari a/p Sithampara Pillai & Anor* [1991] 1 CLJ 150, per Talalla JC (as he then was) at p. 155) and as exemplified by this case, and we think it would not be out of place to express a cautionary reminder in the very apt words of Lord Edmund-Davies in *Farrel v. Secretary of State for Defence* [1980] 1 All ER 166 as follows at p. 173:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

In the event, the appeal is dismissed with costs. The deposit in Court shall be paid out to the account of the taxed costs of the defendant as the respondent herein.